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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JOHN ROCK, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable the Supreme Court of the United States:

Petitioner respectfully represents that it is aggrieved by the final judgment in this cause of the Appellate Court of Illinois, First District, entered on February

Eighteen days later, October 18, 1923, respondent made a second application, but made it in the name of his brother, John Rock (R., 17). This second application respondent did not make in his own handwriting (R., 17). When asked by the superintendent (employing officer) whether he had not made a previous application, respondent allayed suspicion by stating that the previous applicant was his brother (R., 56, 57).

Respondent knew he would again be rejected if he took the physical examination (R., 44); he therefore procured a man named Adam Lenhart to take the examination in the name of John J. Rock (R., 18, 44, 57). Respondent took Lenhart to the doctors' office with him (R., 57); Lenhart went up to the doctors and said, "I am John J. Rock" (R., 57-58). Respondent sat in the waiting room while Lenhart was being examined as John Rock (R., 57). The doctors passed and accepted Lenhart, believing him to be John Rock (R., 58). Respondent then presented himself to the employing officer as John Rock thus certified as physically fit. In this manner respondent obtained work as a switchman under the name of John Rock and so continued for about fourteen months up to the time of the injury in question (R., 18, 34). It was not until later that petitioner discovered that this individual was the same person who had been rejected for physical defects, and whom it never knowingly employed in its train service operations (R., 44).

Respondent when injured brought this suit in the name of John Rock and the same was tried in his behalf, and judgment in his favor was entered and

sustained, entirely on the theory that he was an employee of the petitioner within the meaning of the Federal Employers' Liability Act, and that the provisions of that act applied. Petitioner by special plea denied that respondent was ever its employee (R., 8-10); and has at all times maintained by proper exceptions and assignments of error that by reason of the fraudulently procured mistake as to his identity under which he secured work as a switchman, the contractural relation of employer and employee never existed between the parties; hence that he was not an employee within the meaning of the Federal Employers' Liability Act.

II.

The second ground on which certiorari is here applied for need not be considered unless the first is decided adversely to our contention. It is that assumption of risk, a valid defense under this act, was established as a matter of law.

This Court declared in Toledo St. Louis & Western Railroad Company *vs.* Allen, 160, October term, 1927, decided February 20, 1928, 48 S. C. R., 215, on certiorari, in a case under this act, that:

> "If, upon an examination of the Record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 454

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Petitioner,

vs.

JOHN BOOK, Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF NORTH DAKOTA, FIRST DISTRICT, AND TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA, AND BRIEF IN SUPPORT THEREOF.

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(32,763)

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14, 1928, certiorari denied by the Supreme Court of Illinois on June 21, 1928, sustaining the judgment of the Circuit Court of Cook County for fifteen thousand dollars ($15,000.00) against petitioner and in favor of respondent for personal injuries while working as a switchman, based solely on the Federal Employers' Liability Act (35 Stat., 65).

The first question is whether an imposter (respondent) who, after being rejected for failure to pass the required physical examination on account of bodily defects, secured work as a switchman from a railroad company (petitioner), by impersonating another individual who had passed the physical examination, is an employee of the railroad company within the meaning of the Federal Employers' Liability Act, so as to entitle him to the special benefits of that act, until the fraudulently procured mistake is discovered and the contract rescinded.

Certiorari is here applied for because that question, decided below in favor of the imposter and against petitioner, has never been passed on by this Court, and is of great importance to railroad companies, their employees, and the entire public which uses the railroads.

The Appellate Court of Illinois held that the imposter was entitled to the benefit of the act because, although he insinuated himself into petitioner's train service against its will, by impersonating another individual, still "the relation of master and servant existed" (R., 275, at 282). It quoted with approval the statement that—

> "The contract of employment would not be absolutely void because of the alleged fraudulent statements. The alleged fraudulent statements would only afford grounds for a voidance or annulment of the contract of employment at the option of the company" (R., 281).

The appellate court completely ignored the fundamental distinction between contracts merely voidable for ordinary fraud, and those absolutely void *ab initio* because of a mistake as to the identity of one of the parties. As stated by the Supreme Court of Massachusetts, per Holmes, J., in ***Rodliff vs. Dallinger,* 141** Mass., 1, where one of the contracting parties, through fraud of the other, supposed he was dealing with someone else—

> "There is no question of rescission,—the transaction is void *ab initio,*—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want was due to innocent mistake."

Or, as stated at 13 C. J., 378:

> "There is no agreement where one party enters into a contract under a mistake as to the identity of the other party, as where the party contracted with has falsely represented himself to be another."

Lord Cairnes applied this principle in ***Cundy vs.*** *Lindsay,* 3 App. Cases, 459, saying:

> "With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever."

This fundamental principle, that a complete and fraudulently procured mistake as to the identity of one of the contracting parties renders the contract void *ab initio* without any rescission whatsoever, was ignored by the appellate court holding that the alleged contract of employment in this case was not absolutely void but merely subject to rescission, upon discovery of the truth, which was after the accident occurred. Strong reasons of public policy dictate that this principle should not be ignored in a case of this character under the Federal Employers' Liability Act.

Public safety and welfare demand that railroads should be encouraged, not hampered, in their efforts to allow only physically fit individuals to conduct train operations on which the safety of so many human lives depends. The Federal Employers' Liability Act provides special privileges and benefits, over and above those of the common law, in the interest of men in that hazardous service. But the safety of those rightfully so engaged, as well as that of the traveling public, demands that railroads should select such employees with the greatest care. It would place a premium on fraudulent undermining of such service to allow physically disabled persons who surreptitiously insinuate themselves into the same, against the will of the railroad company, to have the special benefits of the act on the same footing as those rightfully engaged therein.

It is not merely a question of permitting an individual who has no right to employment, say as a switchman, to have his damages measured on the false theory that such is his rightful lifework for which he is now disabled, which is only a question of dollars and cents ultimately to be paid by the traveling public. It goes deeper than that, and touches the very lives of the traveling public, by impairing the safety of train service, if this act is construed as conferring its special benefits on undesirables who succeed in evading the regulations excluding them from such service, instead of remitting them to their common law remedies. This Court has not hesitated in other respects to construe this act in the interests of public policy; and we submit the same principle should govern in this connection.

The true name of respondent is Joe Rock (R., 16, 52). He has a brother, John Rock, who lives in North Dakota and works on a farm (R., 16). Respondent made to petitioner his first application for employment on October 1, 1923, under his true name of Joe Rock (R., 16). The rules of the railway company require every applicant for employment in train service to submit to a complete physical examination and to be approved as to physical fitness by the company's medical examiners (R., 182). Respondent underwent this examination and was rejected as physically unfit because he had been previously operated on for appendicitis and abscess of the stomach and had at the time of the examination a rupture (R., 17, 56-57).

It further stated in the same case:

> "Except as specified in paragraph 4 of the act (not here pertinent) the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees." (Parentheses ours.)

Applying that clear statement to the present case, the undisputed evidence of respondent's own testimony showed that his injury was due to an "ordinary risk of his employment," and that, if it involved any negligence of his employer or fellow employees (which we do not admit), it was "obvious or fully known and appreciated by him."

The map attached to the record (R., opposite p. 78) shows where the accident occurred. It was in the railroad yards at Kolze, Illinois, where trains are made and broken up (R., 2, 3, 5, 6, 21, 34). Here there are main tracks and lead tracks with numerous switch tracks branching therefrom. Respondent was not injured while actually engaged in his work (R., 43). He had left his engine and had gone to supper (R., 22). On his way back to his engine he undertook to cross over the many tracks in the yard (R., 23). He was hurrying as he crossed the tracks (R., 41). He saw the headlight of a locomotive coming from the south pulling a train of about 80 cars (R., 31). It was about 200 feet south of him, and was moving about three miles an hour (R., 23-24, 36-37).

Respondent states that he was blinded by the headlight of this locomotive, but that he kept right on going

(R., 24, 39). He safely crossed the track on which this locomotive and train were approaching without being able to see (R., 39-40). He walked 20 or 25 feet after crossing it (R., 37-38). He then saw a caboose coming down the next track east (R., 24). When he saw the caboose it was about 10 feet from him (R., 25). He had walked onto the track directly in front of this caboose (R., 41) and was struck by it, sustaining the loss of his left leg about 8 inches below the knee (R., 25-27).

The caboose was the foremost of two cabooses which were being shoved north by a locomotive. This movement was one which was made every night in a regular switching movement in making up freights (R., 35, 36). Respondent had crossed the tracks in this locality hundreds of times (R., 29); he had worked as a switchman on the same movement which was being made by the cabooses which struck him (R., 35). Once in a while they had lights on the cabooses and once in a while they did not (R., 35-36). There was no light or man on the cabooses this time (R., 25). Respondent knew that on the old yard lead there might be cabooses backed up without lights; he had seen them so moved before (R., 35-36). Company rules do not require lights on leading cars when moved in yards (R., 182). Respondent's contention that the accident did not occur in the yard limits is untenable, as the map shows (R., opposite p. 78).

Assumption of risk is predicated in this case on the simple proposition that respondent knew when he was blinded by the headlight, as he testified, and volun-

tarily took the risk of what happened to him when he hurried on across the tracks in that condition, without remaining where he was in a position of safety. He knew that the movement of the cabooses on the tracks beyond was a regular movement to be expected about that time (R., 35-36). He knew that sometimes no light was carried on the cabooses as they were pushed along (R., 35-36). This he admitted on cross examination.

The Appellate Court was in error in saying (R., 275, at 283-284) that the jury might find a custom to carry warning lights on the head caboose in such movements, on the basis of a statement to that effect in his direct examination, when it was in effect retracted on his cross-examination. Moreover, since he was blinded, as he testified, he could not have seen a switchman's lantern on the head caboose even if it had been there. Thus we come back to the blinding effect of the headlight as being the proximate cause of the accident, according to plaintiff's testimony, and the inevitable conclusion that he assumed the risk of the known dangers lying beyond when he advanced upon them while thus blinded, instead of remaining where he was. The excuse that he was in a hurry to get back to work is obviously ineffectual.

The Court of Appeals (R., 284) specifically noted that petitioner contended that the risk was assumed. It then proceeded to discuss, not the evidence on that point, but the evidence on which it thought that a finding of negligence might be based against petitioner. It then stated, without any discussion of the

evidence as to assumption of risk, that the jury was correctly instructed on that point and that it was

> "A question of fact—not of law—whether the injury received by plaintiff was occasioned by or through a period of his employment, the risk of which he had assumed" (R., 284).

This we deny, maintaining that this was not a question of fact for the jury because the undisputed evidence makes it impossible for reasonable men to conclude otherwise than that the risk was assumed. In such a state of evidence, the rule of common law is that the jury be not permitted to find that the risk was not assumed, and we submit on the authority of Toledo, St. Louis & Western Railroad Company *vs.* Allen, *supra*, that we are entitled to have this Court consider the record and give us the benefit of the common law rule of which we have been deprived, by reversing the judgment against us.

III.

A third ground for issuance of the writ of certiorari is that the charge of negligence was not established against petitioner by the evidence. Discussion of this will be found in our attached brief.

At the close of plaintiff's case, and again at the close of all the evidence, petitioner moved the trial court to direct a verdict in its favor; which motions were denied (R., 72 77; 255). After verdict for re-

IV.

spondent, petitioner successively moved for a new trial and in arrest of judgment (R., 264-265). These motions were overruled, and an appeal was taken by petitioner to the Appellate Court of Illinois, First District. Errors were duly assigned in that court, upon which it recognized that petitioner had saved, and duly presented, its contentions that respondent was not an employe within the meaning of the Federal Employers Liability Act, that he assumed the risk, and that there was no warrant for finding negligence on the part of petitioner. It specifically considered, and overruled, those contentions in its opinion; and affirmed the judgment. Respondent then made timely application to the Supreme Court of Illinois to review the case on certiorari; which application that court denied. Since it was discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on certiorari, and the writ was declined, a writ of certiorari from this Court should be addressed to the Appellate Court of Illinois, and the limit of time for making such application here runs from the date when certiorari was refused by the Supreme Court of Illinois, the highest tribunal in that State, on June 21, 1928. American Railway Express Company v. Levee, 263 U. S., 19, 20. Errors urged in this Court are those previously stated, namely, refusal to enter judgment for petitioner on the ground that respondent was not an employe within the meaning of the Federal Employers Liability Act, that he

assumed the risk, and that negligence was not established as against petitioner.

V.

Your petitioner therefore prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Appellate Court of Illinois, First District, and/or to the Supreme Court of the State of Illinois, and the Justices thereof, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Appellate Court of Illinois, First District, in this cause entitled John Rock, Appellee, *v.* Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant, No. 31914, on the docket of said Appellate Court of Illinois, First District, to the end that this cause may be reviewed and determined by this Court as in such case is provided by Sec. 237 of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat., 937).

And your petitioner prays that the certified copy of the record and proceedings of the said Appellate Court of Illinois, First District, together, with a certified copy of the record and proceedings had in the Supreme Court of Illinois, all of which is filed as a part of, and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and that the judgment of said Appellate Court of Illinois, First District, in this case and every part thereof be reversed by this Honorable Court, and your petitioner

prays that it may have such other further remedies and relief in the premises as to this Court may seem appropriate and in conformity with the law.

That this is the first application for writ of certiorari to this Court in this cause.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,

By HENRY S. MITCHELL,
JOHN E. PALMER,
Counsel for Petitioner.

JOHN L. McINERNEY,
1521 *Chicago Temple, Chicago, Illinois, of Counsel.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Appellate Court of Illinois, First District in this cause is found in 247 Ill. App., 600, was filed February 14, 1928, and appears in full in the record (R., 275). The order of the Supreme Court of Illinois made June 21, 1928, denying a petition for writ of certiorari to be addressed to said Appellate Court is not reported, but appears in full in the record (R., 291).

The opinion of the Appellate Court of Illinois, First District, affirming judgment of the Circuit Court of Cook County, Illinois, was filed February 14, 1928 (R., 272), and the order of the Supreme Court of Illinois was made on June 21, 1928, denying the petition for writ of certiorari to be addressed to the Appellate Court of Illinois, First District (R., 291), which petition was duly filed by petitioner May 2, 1928 (R., 275).

The specific claims advanced and rulings made in the lower courts which are relied upon as a basis of this Court's jurisdiction are as follows:

(*a*) The action of the trial court in denying petitioner's motion at the close of plaintiff's case and again at the conclusion of all the evidence to instruct the jury to find defendant not guilty (R., 72-77; 255).

(*b*) The action of the trial court in giving plaintiff's Given Instructions 2 and 3 whereby the jury was in substance instructed that the provisions of the Federal Employers' Liability Act were applicable in this case (R., 256).

(*c*) The action of the trial court in denying petitioner's motion to set aside the verdict and grant a new trial (R., 264-265).

(*d*) The action of the trial court in denying petitioner's motion in arrest of judgment (R., 265).

(*e*) Assignments of error for denial of these motions and said actions of the trial court (R., 266-269).

(*f*) Opinion of the Appellate Court holding that respondent was, at the time of his injury, an employe of petitioner within the meaning of the Federal Employers' Liability Act and particularly in making the following statement wholly unsupported by the record and in fact directly contradicted by the record (R., 9), to-wit:

> "The declaration alleges that the plaintiff was an employe under the provisions of the Federal Employers Liability Act, and the defendant admits that he was" (R., 275).
>
> In this connection see (R., 9).

(*g*) Opinion of the Appellate Court in holding as follows:

> "After a careful consideration of the question, we have reached the conclusion that at the time the plaintiff sustained the injury in question the relation of master and servant existed between him and defendant" (R., 282).

(*h*) The opinion of the Appellate Court in holding as follows:

> "It was a question of fact—not of law—whether the injury received by the plaintiff was occasioned by, or through a peril of his employment, the risk of which he had assumed" (R., 284).

(*c*) The opinion of the Appellate Court in holding that defendant was guilty of negligence proximately causing, or contributing to, respondent's injury (R., 283-284).

Statutory provisions under which this Court's jurisdiction is invoked.

Section 237(*b*) of the Judical Code as amended February 13, 1925. (c. 229, 43 Stat., 937.)

Cases believed to sustain the jurisdiction of this Court.

The action is brought to establish a liability depending solely on acts of Congress.

2d Employers' Liability cases (Mondou *v.* N. Y. etc., R. Co.), 223 U. S., 1.

Seaboard A. L. R. Co. *v.* Horton, 233 U. S., 492.

It therefore involves rights that exist (if at all) exclusively under Federal statutes and, being such, presents Federal questions for determination by this Court. *St. Louis etc., R. Co. v. McWhirter*, 229 U. S., 265.

Chicago, Rock Island & Pacific Railway Co. vs. Bond, 240 U. S., 449, reversing judgment of the Supreme Court of Oklahoma on construction of Federal Employers' Liability Act and particularly in regard to whether a plaintiff was an employe.

Chicago, Milwaukee & St. Paul Railway Company v. Coogan, 271 U. S., 472; writ of certiorari to the Supreme Court of the State of Minnesota granted March 16, 1925, 267 U. S., 589. Decision of this Court, revers-

ing judgment of Supreme Court of Minnesota entered in an action under the Federal Employers' Liability Act.

See also:

New Orleans & Northeastern R. R. Co. v. Harris, 247 U. S., 367; 62 L. Ed., 1167.

St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S., 281; 52 L. Ed., 1061, 1067.

Seaboard A. L. Ry. Co. v. Duvall, 225 U. S., 477; 56 L. Ed., 1171 (1175).

Chesapeake and Ohio Railway Company v. Nixon, 271 U. S., 218; writ of certiorari to the Supreme Court of the State of Virginia granted April 13, 1925, 267 U. S., 590. Decision of this Court reversing judgment of Supreme Court of Appeals of Virginia which affirmed a recovery of damages in an action under the Federal Employers' Liability Act.

American Railway Express Company v. Levee, 263 U. S., 19, 20, overruling contention that writ of certiorari was addressed to Court of Appeals, First Circuit, of the State of Louisiana and not to the Supreme Court of the State, and holding that when the jurisdiction of the highest court of a State to review a judgment of an intermediate tribunal is discretionary, and review is declined, the writ of certiorari from this Court should be addressed to the intermediate tribunal and that in such case the limit of time for applying to this Court is from the date when the writ of certiorari is refused by the highest court of the State.

Statement of the Case.

Petitioner respectfully refers to the foregoing petition for certiorari; and asks that for the sake of brevity said statement of the case be deemed incorporated in this brief at this point without repetition of the same. For convenience we refer to respondent as plaintiff and petitioner as defendant.

Specification of Assigned Errors Intended to be Urged.

I.

There was error in permitting recovery herein solely upon rights asserted under the Federal Employers' Liability Act; and in holding that plaintiff was an employe of defendant within the meaning of said act; and in holding that the fraud perpetrated upon defendant by plaintiff in seeking employment did not deprive plaintiff of the right to claim the benefits accruing to employes under the provisions of the Federal Act.

II.

There was error on the part of the trial court in denying defendant's motion to direct the jury to find defendant not guilty, which motion was made at the close of all the testimony and upon the ground that plaintiff's injury resulted from dangers incident to his employment and conditions known and appreciated by him and that the risks of such dangers were assumed; and there was error on the part of the Appellate Court in sustaining said rulings of the trial court.

III.

There was error in denying defendant's motion to direct the jury to find defendant not guilty made at the close of all the testimony and upon the ground that there was not sufficient evidence to establish negligence on the part of defendant proximately causing or contributing to, plaintiff's injury; and there was error on the part of the Appellate Court in sustaining said rulings of the trial court.

Summary of Argument.

1.

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II.

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ARGUMENT.

I.

There was error in permitting recovery herein under the Federal Employers' Liability Act; and in holding that plaintiff was an employe of the defendant within the meaning of said act; and in holding respondent entitled to the benefits of said act.

This case presents an extraordinary situation. It is brought under the Federal Employers' Liability Act. It is instituted and prosecuted to judgment in the name of John Rock, a man never employed by defendant, who never was injured, and who was working on a farm in North Dakota at the time of the employment, the injury and the trial. The employment was by gross fraud obtained by one Joe Rock, masquerading as his brother John. Defendant by special plea denied that plaintiff was ever its employe (R., 8-9). The plaintiff in the action therefore had the burden of establishing a valid contract of employment; that he was injured while employed in interstate commerce; that his injury was proximately due to the negligence of defendant; and that he did not assume the risks involved.

We briefly advert to the proof of employment given by Joe Rock and respecting which there is no dispute. Joe Rock testifies that his true name is Joe Rock (R., 16); that he made to defendant an application for employment as a switchman October 1, 1923, under his true name (R.,16); that he was rejected because in 1912 he had an operation for abscesses of the stomach and in 1917 had his appendix removed and had at the time of the examination a rupture (R., 17); that he was physically examined by the railway doctors Thompson and Mullen, who put him through the "sprouts," and he told them all about himself (R., 43); that they rejected him because he was not competent to take a job as switchman (R., 43); that these doctors told him he had a rupture and could not pass

(R., 57); that 18 days later, on October 18, 1923, he made to defendant another application for employment, but not in his own handwriting (R., 17); that he made it under the name of his brother, John Rock, who was then and at the time of the trial working on a farm in North Dakota (R., 16); that he knew he would be rejected if he had another examination (R., 44); that he therefore had another fellow go down for him (R., 18); that this fellow got examined by the doctors (R., 18), that he (Joe Rock) then went to work (R., 18); that the fellow who did take the physical examination under the second application was Adam Lenhart (R., 45); that he (Joe Rock) got Lenhart as a substitute because he knew there would have to be another physical examination (R., 54); that when he made the second application the Superintendent said, "Wasn't you here before?" and he (Joe Rock) answered, "No, my brother was here" (R., 56, 57); that the Superintendent then gave him a slip to the doctors in the name of John Rock (R., 56); that he then got Lenhart and took Lenhart with him to the doctors' office (R., 57); that he (Joe Rock) sat in the waiting room and Lenhart went up to the doctors and said, "I am John J. Rock," and was examined and passed (R. 57-58).

This Court will take judicial notice of the importance of railway rules requiring complete physical examination of applicants for the important and dangerous work of railway switchmen; and that it involves questions of public policy of far-reaching importance. There is to be considered not alone the safety and lives of such employes themselves, but the safety and lives

of other employes, the traveling public, the safety of railway property, and the safety of persons and property generally, as at railway crossings, etc. The regulation is a reasonable and salutary one, and, as is said in *Norfolk & Western Railway v. Bondurant*, 107 Va., 515; 15 L. R. A. (N. S.), 443:

> "It would be a hard measure of justice to hold a company responsible on the one hand for failure to prescribe rules and on the other to refuse to protect it from the consequences of the violation of reasonable and proper rules adopted and promulgated in the discharge of the duty imposed by law."

There Federal Act grants to railway employes rights which never obtained at common law and rights and advantages enjoyed by none other than such employes. It is respectfully submitted that to be an employee under the act there must be a valid contract of employment; and that one may not obtain by flagrant fraud the special rights and advantages granted by the act. Joe Rock was not an employe within the meaning of the act; but for his fraud he would never have been in this railway yard. He was therefore a trespasser, or at most a bare licensee, to whom the Railway Company stood in no contractual relation and owed no duty based on the existence of such relation. The fact that the physical defects which caused

this man's rejection did not cause his injury is not controlling. The following cases are directly in point:

Stafford *v.* B. & O. R. Co., 262 Fed., 807.

Norfolk & Western Ry. Co. *v.* Bondurant, 107 Va., 515; 15 L. R. A. (N. S.), 443.

Fitsmaurice *v.* N. Y., N. H. & H. R. Co., 192 Mass., 159; 6 L. R. A. (N. S.), 1146.

Morgan Munitions Co. *v.* Studebaker Corp., 226 N. Y., 94.

Mexican Amole Soap Co. *v.* Clarke, 72 Ill. App., 655.

II.

Plaintiff's injury resulted from dangers incident to his employment; and from conditions well known and appreciated by him; and the risks arising from such dangers were therefore assumed.

That this accident occurred in a railroad yard is beyond question. It is expressly so alleged in every one of the four counts in the declaration (R., 2, 3, 5, 6); it is established by the testimony of the plaintiff himself (R., 21, 34); also by the map (R., opposite p. 78), and it is nowhere disputed. Plaintiff states at R., 34, "It was a railroad yard." The Belt Line train on the new yard lead was coming into the yard on its regular time as plaintiff knew (R., 35); the cabooses which were being shoved north on the old yard lead were got every night from the caboose storage track east of the depot, brought in over Irving Park Boulevard on this same track and kicked in on the switching tracks to be used in making up freight trains (R., 35). Plaintiff had worked in this yard 13 months and was thoroughly

familiar with it; he had been on duty both night and day; he knew all about the nightly movement of these cabooses; he had worked on that job himself (R., 35-36); once in a while they had lights on the cabooses and once in a while they did not (R., 35-36); he knew that on the old yard lead (the one he went upon after passing in front of the Belt Line train) there might be cabooses backed up without light or man on them (R., 35-36); he had seen that before (R., 36). Plaintiff testifies to no knowledge of any custom to have a light or man on the foremost caboose, nor does he testify to reliance on any such custom. He testifies to no knowledge of any custom of this caboose train to give signals by whistle or bell nor does he testify to reliance on any such custom. The rule of the railway company is as follows (R., 182):

> "When cars are pushed by an engine *except when shifting and making up trains in yards*, a flagman must take a conspicuous position on the front of the leading car."

It is undisputed that the movement in question was that of shifting and making up trains in the yard. There is no rule or regulation of the railway requiring the blowing of the whistle or the ringing of the bell in such movements; nor was there any testimony of a custom to give such signals. It is submitted that the risks of such movements in this yard must be held to have been assumed by plaintiff.

Toledo, St. Louis & Western v. Allen, 48 S. C. R., 215; 72 L. Ed., 267.

Boldt *v.* Penn. R. R. Co., 245 U. S., 441, 445; 62 L. Ed., 120.

Pryor *v.* Williams, 254 U. S, 43; 65 L. Ed., 120.

Chesapeake & Ohio *v.* Nixon, 271 U. S., 218.

Jacobs *v.* Southern R. Co., 241 U. S., 229; 60 L. Ed., 970.

Baugham *v.* N. Y. P. & N. R. Co., 241 U. S., 237; 60 L. Ed., 977.

Seaboard A. L R. R. Co. *v.* Horton, 233 U. S., 492; 58 L. Ed., 1062.

Gilmer *v.* Yazoo & M. V. R. R. Co., 4 Fed. (2d), 963; certiorari denied, 268 U. S., 705; 69 L. Ed., 1167.

Davis *v.* Phila. & R. Ry. Co., 276 Fed., 187.

Connelley *v.* Penn. R. Co., 228 Fed., 322.

Ross *v.* C., R. I. & P. Ry. Co., 243 Ill., 440.

C. & N. W. Ry. Co. *v.* Donahue, 75 Ill., 106.

As to the glare of the headlight on the locomotive of the Belt Line train, it is submitted that such condition was clearly assumed; likewise the resulting inability to see whether cars were being moved on the next track, the old yard lead. Plaintiff testifies that he had faced such headlights time and time again (R., 39); that he knew all about the effects of so facing them (R., 39, 40, 42); that because of this headlight at the time in question he could not see whether there was anything on the old yard lead or whether it was clear; in fact he couldn't see anything (R., 40).

> "Q. Whatever happened, you couldn't see anything coming up or down the old lead?
> "A. No.

"Q. And you walked across without being able to see, is that right?

"A. Yes sir (R., 40).

"Q. How far down did you walk after you crossed the track (new yard lead), before you were struck?

"A. I walked about—about 25—about 20 or 25 or 20 feet, something like that" (R., 37-38).

It is submitted that thus knowing fully all the material conditions, plaintiff assumed the risks thereof. *Jacobs v. Southern R. Co.*, 241 U. S., 229; 60 L. Ed., 970. The Illinois Appellate Court appears to hold that negligence may be found in failure to have a man or light on the advancing end of the first caboose; but in view of the admitted fact that plaintiff would not have seen either, such failure cannot be held any part of the proximate cause of the accident. Plaintiff does not testify that he relied on any such thing, neither does he testify that he paid any attention to whether signals were given by the locomotive pushing the cabooses. In view of the fact that it was some 20 feet to the old lead track; that the Belt Line train was between him and the caboose train, that there were two cabooses and the tender ahead of the locomotive, that plaintiff was moving rapidly and without attention; it is obvious that any signals given by the locomotive of the caboose train would not have been useful to plaintiff. *Toledo, St. Louis & Western v. Allen*, 48 S. C. R., 215, 72 L. Ed., 267.

III.

The claim of negligence on the part of defendant proximately causing or contributing to the injury does

not find substantial support in the evidence as is required by the decisions of this Court.

The Appellate Court of Illinois does not find negligence in having a bright headlight on the locomotive of the Belt Line train. That is obviously right for in no aspect of the case can the condition of that headlight be said to be negligence as to plaintiff. He was not put to work in the glare of that headlight; he had no concern with the movement of either the Belt Line train or the switching of the caboose (R., 43). But the glare of the Belt Line headlight, and nothing else, was the cause of plaintiff not seeing the moving cabooses on the old yard lead. It would seem conclusive that plaintiff's major premise as to defendant's negligence is wholly unestablished.

But the Illinois Appellate Court held that a finding of negligence might be based on failure to have a man or light on the foremost caboose and on the failure to signal the "kick in" movement. We think we have already shown that neither of these failures (even if negligence), can be held the proximate cause of the accident. We think we have sufficiently shown also that the risks of such movements without signal or lookout, were assumed by plaintiff. Plaintiff's own testimony negatives any uniform custom to have either man or light on these cabooses in this switching movement (R., 35-36); and, as we have shown, no rule requires it. Neither is there any proof of rule or custom requiring signals by whistle or bell. Neither is there any showing that either lookout or signal would have prevented this accident.

The Illinois Court's holding of negligence in respect to the failure to give signals or have a man or light on cars in a switching movement such as this was, is contrary to the rule established by this Court and the lower Federal Courts, as well as by numerous State courts. We cite but a few of the multitude of cases on this point:

Toledo, St. L. & W. *v.* Allen, 48 S. C. R., 215; 72 L. Ed., 267.

Aerkfetz *v.* Humphreys, 145 U. S., 418; 36 L. Ed., 758.

Rosney *v.* Erie R. Co., 135 Fed., 311, 315.

Connelley *v.* Penn. R. Co., 201 Fed., 54, 57.

Beecroft *v.* G. N. Ry. Co., 134 Minn., 86.

Neidlein *v.* So. Pac. Ry. Co., 180 Cal., 63.

Hinson *v.* Atlanta & C. A. L. Ry. Co., 172 N. C., 646

Olson *v.* C., R. I. & P. Ry. Co., 162 Minn., 194.

Lancaster *v.* St. L. & S. F. R. Co., 128 Okla., 176.

It is therefore respectfully submitted that a writ of certiorari should be granted.

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